IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

REALTIME ADAPTIVE STREAMING LLC, Plaintiff, v. SLING TV L.L.C., et al., Defendants.	Case No. 1:17-cv-02097-RBJ

PLAINTIFF REALTIME'S RESPONSIVE CLAIM CONSTRUCTION BRIEF

Realtime and Defendants offer not just competing proposals but different approaches to claim construction. Where terms have a plain and ordinary meaning, it almost always controls. But Defendants ask this Court to burden clear terms with extraneous baggage but cannot point to any requisite disclaimer. This invites reversible error. The Court should reject Defendant's proposals and adopt Realtime's proposals.

A. "access profile"

Claim construction is "not an obligatory exercise in redundancy." *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997). Where a term is used as its plain meaning, the court should not recharacterize it using different language. *Mentor H/S, Inc. v. Med. Device Alliance, Inc.*, 244 F.3d 1365, 1380 (Fed. Cir. 2001). This is precisely the situation here—as four of the five Defendants (Sling TV, Sling Media, Dish Techs., and Dish Net.) agree that the term should not be recharacterized. Br. at 2, n. 2.

Arris, the sole Defendant seeking a construction, proposes one narrower than the ordinary meaning. But it points to no clear lexicography or disavowal that would justify such a departure. *See Thorner v. Sony*, 669 F.3d 1362, 1367–68 (Fed. Cir. 2012). Arris's proposal is inconsistent with the patent's express teaching that an access profile can "comprise information that enables the controller to select a suitable compression

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algorithm that provides a desired balance between execution speed (rate of compression) and efficiency (compression ratio).” ‘535 patent, 8:8-13; Zeger Decl. ¶14.

Arris does not even attempt to construe “profile” in “access profile.” Indeed, its improperly narrow construction subsumes that claim term within it. Instead, it seeks to import twelve words in place of the clear phrase “access”: “a profile containing information about the number or frequency of reads and writes.” Br. at 2. In support, Arris points to only one embodiment described in the specification, which it contends shows “information about the number or frequency of reads and writes.” *Id*.

Arris’s proposal invites two legal errors. *First*, importing “information about the number or frequency of reads and writes” into the claim itself would violate established Federal Circuit precedent, which forbid importing limitations from the specifications into the claims, absent clear disclaimer. *Thorner*, 669 F.3d at 1365-67. *Second*, Arris’s proposal actually *excludes* disclosed embodiments. Such constructions are “rarely, if ever, correct.” *SanDisk Corp. v. Memorex Prod., Inc.*, 415 F.3d 1278, 1285 (Fed. Cir. 2005). Here, Arris’s proposal would exclude the patent’s express teaching that the access profile may comprise data type information alone. ‘535 patent, 11:35-38 (“profiles may comprise a map that associates different data types (based on, e.g., a file extension) with preferred one(s) of the compression algorithms 13.”); Zeger Decl. ¶14.

B. “throughput of a communication channel”

The term “throughput” is an ordinary word that simply means *data rate or usage*. Zeger Decl. ¶15. The claims and specifications use the term in its ordinary sense. *E.g.,* ‘535 patent, Abstract (“increase the throughput and eliminate the bottleneck”); 7:51-55 (“system … based on the actual or expected throughput (bandwidth) of a system … and a technique of optimizing based upon planned, expected, predicted, or actual usage.”); 12:28-35 (“an overall faster (higher throughput) … system performance”);

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13:62-65 ("If the throughput of the system is not meeting the desired threshold (e.g., the compression system cannot maintain the required or requested data rates)").

Defendants do not contend that "communication channel" requires construction, as they include it verbatim in their proposal. But Defendants try to rewrite "throughput" with their proposal "number of pending transmission requests." But that is not the plain and ordinary meaning of "throughput." Zeger Decl. ¶16. The patentee did not clearly re-define "throughput," nor is there a clear and unmistakable disclaimer limiting "throughput" to Defendants' proposal. *See Thorner*, 669 F.3d at 1365-67.

As to the specification, Defendants point only to the '535 patent at 8:22-27, which states "[t]he system throughput tracked by the controller comprises a number of pending transmission requests over the communication channel." This is neither lexicography nor clear and unmistakable disclaimer. Indeed, it merely describes an aspect of a particular embodiment. Courts "do not import limitations into claims from examples or embodiments appearing only in a patent's written description, even when a specification describes very specific embodiments of the invention or even describes only a single embodiment." *JVW Enters. v. Interact Acc., Inc.*, 424 F.3d 1324, 1335 (Fed. Cir. 2005).

Further, the specification also makes clear that tracking the number of pending requests is just one "example" to track throughput. *E.g.,* '535 patent, 13:57-62 ("***For example***, the controller may track the number of pending disk accesses (access requests) to determine whether a bottleneck is occurring."). The number of pending requests in a system may indicate data rate or usage of the system, but there are other measures of data rate or usage. Zeger Decl. ¶16. There is no clear disclaimer.[1]

Defendants also point to prosecution history. But like a statement in the

[1] Defendants' reliance on *Nystrom* (Br. at 5) is misplaced. There, the parties agreed on the ordinary meaning and the plaintiff sought to broaden the term. Here, Realtime is not seeking to broaden the term but to maintain the plain meaning used in the specification.

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specification, a claim term cannot be narrowed absent an act that is "both clear and unmistakable." *TecSec v. Int'l Bus. Machines*, 731 F.3d 1336, 1346 (Fed. Cir. 2013) ("our precedent requires that the alleged disavowing actions or statements made during prosecution be ***both clear and unmistakable***."). Defendants do not identify any such statement. Indeed, the prosecution history they identify does not even mention Defendants' language "number of pending transmission requests." *See* Def.'s Ex. D.

Defendants also argue that "'throughput' cannot include 'bandwidth.'" Defendants do not explain how this relates to their proposal. Regardless, Defendants' argument also fails on the merits, as there was no unmistakable disavowal of "bandwidth." First, the patentee clearly stated that the claim was being amended "for the purpose of advancing prosecution of this Application" and was not "acquiescing to the merits" of the examiner's written description argument. *See* Def.'s Ex. D (5/27/14 Amd.) at 15. Second, the amendment during prosecution was not a simple replacement of "bandwidth" with "throughput," as Defendants contend, but rather replacing "bandwidth of a transmission line or" with "throughput." And third, the patentee cited numerous portions of the specification that indicate that "throughput" and "bandwidth" are similar concepts. *See* Def.'s Ex. D (5/27/14 Amd.) at 16-17 (quoting specification re: "throughput (bandwidth)"); Zeger Decl. ¶18. There is no unmistakable disclaimer.[2]

Defendants' argument regarding "bandwidth" also directly contradicts what they have represented to the PTAB in their petition for *inter partes* review of the '610 patent:

> "It was well-known … that the bandwidth of a communication channel is a throughput of the channel. DISH1003-¶¶97-102. Indeed, the '610 Patent itself equates the throughput of a system with the bandwidth of the system."

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[2] Defendants reliance on *Sterisil* (Br. at 5) is misplaced. There, the patentee added a limitation to overcome the prior art. Here, the patentee never stated that "throughput" excluded "bandwidth." To the contrary, the patentee indicated that the two were similar/related concepts by citing portions of the specification that indicated as much.

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Ex. 1 (Sling/DISH's IPR Petition at 32). Indeed, Defendants' expert analyzed the file histories of the '610 patent and opined that "bandwidth of a communication channel is a throughput of the channel." Ex. 2 (Sling/DISH's IPR Expert Decl. at ¶¶ 28, 102).

C. "asymmetric [compressor(s)/compression]"

Realtime's Proposed Construction	Defendants' Proposed Construction
Not indefinite. If this Court did construe the term: "**a compression algorithm in which the execution times for compression and decompression differ significantly**."	"**a compression algorithm in which the execution time for compression and decompression differ significantly**," which renders the claims indefinite under *Halliburton Energy Servs., Inc. v. M-I LLC,* 514 F.3d 1244 (Fed. Cir. 2008)

1. The patent provides the definition of the term "asymmetric" compression algorithm, and confirms that a POSITA would understand certain algorithms are *always* asymmetric or symmetric.

As Defendants acknowledge, the patent defines this term: "a compression algorithm in which the execution time for compression and decompression routines differ significantly." '535 patent, 9:63-66. This comports with how a POSITA would understand the term—and defines it precisely. Zeger Decl. ¶19. Applying the definition, a POSITA would understand with reasonable certainty the bounds of the claims. *Id.* But the patent specification teaches more, and provides further guidance. It explains that compression algorithms are inherently either symmetric or asymmetric. '535 patent, 9:63-10:9; Zeger Decl. ¶20. It even states, as an example, that Lempel-Ziv is inherently *asymmetric*. '535 patent, 10:2-4. On the other hand, Huffman is inherently *symmetric*. *Id.* at 10:8-9. The term "asymmetric" relates to examining the relative difference in the time it takes to perform the steps, which is a fundamental property of the algorithm that does not significantly depend on external factors, such as hardware that is used. Zeger Decl. ¶20. This is one reason why certain algorithms are asymmetric, and other symmetric, *regardless of the specific hardware or software used*. Zeger Decl. ¶20.

2. Defendants cannot meet their burden of showing that the claims are

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